Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6393

JANE DOE, et al.,
Appellants,

v.

EDWARD M. SEARS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

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JANE DOE, et al.,
Appellants

Vs.

EDWARD M. SEARS,
Appellee

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Georgia on the ground that the appeal is not within the jurisdiction of this Court under 28 U.S.C. §1257(2) and on the further ground that the questions raised by the Appellant are so insubstantial as to need no further argument.

I.

THE STATE STATUTE INVOLVED AND
THE NATURE OF THE CASE.

A. The Statute

The Georgia Open Records Act (Ga. Laws 1967, p. 455, as amended by Ga. Laws 1970, p. 163 (Ga. Code Ann. §40-2701 et seq.)), authorizes citizens of Georgia to make a reasonable, personal inspection of "[a]ll State, County and municipal records, except those, which by order of the court of [Georgia] or by law, are prohibited from being open to inspection by the general public . . . ." (Emphasis added) The Act makes a further exception for "medical records and similar files, the disclosure of which would be an invasion of personal privacy." (Ga. Code Ann. §40-2703)

B. The Nature Of The Case

The Appellee invoked the Open Records Act in an effort to examine certain records maintained by the Atlanta Housing Authority. Those records relate to charges that Authority officials have favored unidentified tenants by permitting them to live rent-free in public housing while more deserving candidates for public subsidies have been denied housing altogether. The records identify all tenants with rent arrearages as of given points in time. By inspecting them, the Appellee will be able to learn whether in fact particular tenants had been allowed to forego their rental payments for substantial periods of time. By learning the identity of those tenants, the Appellee may determine whether excessive leniency in rent collection is practiced generally by the Authority's project managers or whether favoritism is instead confined to a specific project. Once the names of delinquent tenants are made known, it will also be possible to investigate whether those tenants have been given favors because of political or other influence with the Authority or with other branches of City Government.

When the Atlanta Housing Authority refused to let him examine the records he requested, the Appellee petitioned for a writ of mandamus. The trial court allowed the Appellant and her class to intervene after the Authority had filed an answer asserting, in part, that the constitutional rights of its tenants would be violated if the records were made available. When the trial court failed to grant the Appellee complete relief, both sides appealed. Ultimately, the Supreme Court of Georgia ruled that the requested records should be made avail-

able for inspection in their entirety. Review of that judgment has now been sought, not by petition for certiorari, but by direct appeal under 28 U.S.C. §1257(2).

II.

ARGUMENT

A. Because The Constitutionality Of The Open Records Act Was Not Challenged In The Proceedings Below, This Appeal Is Not Within The Jurisdiction Of This Court.

By the express terms of the Open Records Act, no materials as to which a constitutional right of privacy exists are subject to inspection, since all such records would, of course, be prohibited "by law" from disclosure. Ga. Code Ann. §40-2701. (Emphasis added) For that reason, the parties focused their debate in the lower courts on the nature and content of the requested records, not on the validity of the Act itself. At no time did the Appellant seek to invalidate that statute. Rather, the Appellant simply urged that, "Disclosure to [Appellee] of the records he seeks in this action would violate privacy rights secured to [the Appellant and her class] by the laws of Georgia and the Constitution of the United States." (Answer of Intervenor-Defendants, Fourth Defense) In other cases this Court has ruled that arguments framed in that manner do not question the "validity" of a state statute within the meaning of 28 U.S.C. §1257(2). Merganthaler Linotype Co. v. Davis, 251 U.S. 256, 259, 40 S.Ct. 133, 64 L.Ed. 255 (1920); Hanson v. Denckla, 357 U.S. 235, 244, 78 S.Ct. 1228, 2 L.Ed.2d 1283

(1958); Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185, 65 S.Ct. 624, 89 L.Ed. 857; Rohr Aircraft Corp. v. San Diego County, 362 U.S. 628, 80 S.Ct. 1050, 4 L.Ed.2d 1002. Based on those decisions, this Court has no jurisdiction to entertain a direct appeal from the judgment below.

B. Since The Privacy Interest Which The Appellant Advocates Is Not Of Constitutional Magnitude, The Appellant's Waiver Contention Involves Nothing More Than The Appellant's Common Law Right To Privacy And Does Not Present A Substantial Federal Question.

In Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), this Court observed that two categories of privacy interests have been held worthy of constitutional protection: (1) "the interest in independence in making certain kinds of important decisions" and (2) "the individual interest in avoiding disclosure of personal matters." 429 U.S. at 599-600. As the Court acknowledged in Whalen, the first of those two categories has been limited to situations involving such matters as contraception, miscegenation, abortion, and similar family matters. The second category has not been as clearly delineated. Still, limited disclosures of personal information by the Government have not been thought to violate an individual's constitutional rights, especially where disclosure would have no adverse effect upon rights guaranteed by the First and Fourth Amendments. See O'Brien v. Digrazia, 544 F.2d 543, 545-46 (1st Cir. 1976) (observing that personal financial information has received little constitutional protection);

Tosh v. Buddy's Supermarkets, Inc., 482 F.2d 329 (5th Cir. 1973) (dissemination of arrest records to private citizens); Crain v. Krehiel, 443 F.Supp. 202, 209 (N.D. Cal. 1977) (disclosure of informant's identity); and Morris v. Danna, 411 F.Supp. 1300 (D. Minn. 1976), aff'd per curiam 547 F.2d 436 (8th Cir. 1977) (disclosure of information in welfare files).

The interest asserted in this case is simply an interest against embarrassment that might result if the Atlanta Housing Authority divulges the Appellant's name, source of income, and the amount of her unpaid rent. By according constitutional significance to that interest, the Court would constutionalize the private embarrassing facts aspect of the invasion of privacy tort. Thereafter, state officials would risk liability under 42 U.S.C. §1983 by honoring any Open Records request for information not generally known about a specific individual or group. The result would be to discourage the free flow of information about state government.

In Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), this Court held that a person has no constitutional protection against the publication of false statements about the person's life. Given that decision, it follows that the far less weighty interest at stake here, the interest against the publication of true facts, does not rise to a constitutional plane. Accordingly, there is no substance to the Appellant's waiver claim, since, under the circumstances, there was no constitutional right to be waived. Any error in the lower court's holding as to waiver was therefore harmless.

III.

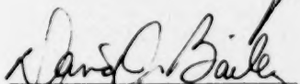
CONCLUSION

WHEREFORE, Appellee respectfully submits that this appeal does not lie within the Court's appellate jurisdiction and that the question upon which this cause depends is so unsubstantial as not to need further argument. For those reasons, the Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered below by the Supreme Court of Georgia.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel for all parties in the foregoing matter with a copy of APPELLEE'S MOTION TO DISMISS OR AFFIRM, by depositing same in the United States Mail, postage pre-paid, addressed as follows:

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This 9th day of May, 1980.

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